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No. 81-4

In the Supreme Court of the United States

OCTOBER TERM, 1980

PRAMAN CHIRAVACHARADHIKUL, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether discretionary relief from deportation under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c), is available to an alien who can establish the required period of seven years' "lawful unrelinquished domicile" only by including a period of residence in the United States prior to his admission as a permanent resident.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 645 F.2d 248. The opinion of the Board of Immigration Appeals (Pet. Supp. App. 5a-9a) and the oral decision of the immigration judge (Pet. Supp. App. 1a-4a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 1981. A petition for rehearing was denied on May 1, 1981 (Pet. Supp. App. 10a-11a). The petition for a writ of certiorari was filed on July 2,

1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c), provides in pertinent part:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) to (25), (30), and (31) of subsection (a) of this section.

STATEMENT

1. Petitioner is a native and citizen of Thailand. He entered the United States on December 4, 1968, as a nonimmigrant student under Section 101(a)(15)(F)(i) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. 1101(a)(15)(F)(i).[1] On March 27, 1970, after petitioner assumed employment as a chauffeur for the Ambassador of Thailand to the United States, petitioner's status was altered to that of an employee of a foreign government admitted as a nonimmigrant under Section 101(a)(15)(A)(ii) of the Act, 8 U.S.C. 1101(a)(15)(A)(ii). On July 19, 1971, petitioner married a foreign national, after

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[1] Under the Immigration and Nationality Act there are only two categories of aliens entering the United States. Every alien who enters the country is deemed an "immigrant," unless he can establish that he is a "nonimmigrant." 8 U.S.C. 1101(a)(15), 1184(b); see *Elkins* v. *Moreno*, 435 U.S. 647, 664 (1978).

5a).[3] Petitioner conceded deportability at the subsequent deportation hearing (J.A. 41-42),[4] and the immigration judge ordered him deported to Thailand. The immigration judge also rejected petitioner's application for discretionary relief from deportation under section 212(c) of the Act, 8 U.S.C. 1182(c) (Pet. Supp. App. 3a).[5]

The Board of Immigration Appeals dismissed petitioner's appeal from the decision of the immigration judge (Pet. Supp. App. 5a-9a), holding that petitioner was statutorily ineligible for waiver of deportability relief under Section 212(c) because he "does not have the requisite period of continuous lawful unrelinquished domicile in the United States" (Pet. Supp. App. 8a-9a). The Board also held that if petitioner were eligible for discretionary relief under Section 212(c), it would be denied in view of his conceded involvement in the distribution of cocaine (*id.* at 9a).

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[3] The court of appeals erroneously stated (Pet. App. 4a & n.2) that the provision authorizing deportation cited by the INS was 8 U.S.C. 1251(a)(2). This error has no bearing on the question presented by the petition.

[4] "J.A." refers to the Joint Appendix filed in the court of appeals.

[5] Although Section 212(c) on its face applies only to exclusion proceedings initiated upon return from abroad, it has been extended progressively, through a series of administrative and judicial decisions, to deportation proceedings, even when no travel abroad subsequent to the act establishing deportability has taken place. See *In re Silva*, 16 I. & N. Dec. 26, 30 (1976); *Francis* v. *INS*, 532 F.2d 268 (2d Cir. 1976); *In re Smith*, 11 I. & N. Dec. 325 (1965); *In re G. A.*, 7 I. & N. Dec. 274 (1956); see also *In re* L., 1 I. & N. Dec. 1 (1940); cf. *In re A.*, 2 I. & N. Dec. 459 (1946); but cf. *Castillo-Felix* v. *INS*, 601 F.2d 459, 462 n.6 (9th Cir. 1979). The INS and BIA have acquiesced in this interpretation of Section 212(c), see *In re Silva*, *supra*, and it is not at issue in this case.

3. A divided panel of the court of appeals affirmed (Pet. App. 1a-15a). The court noted that, ever since its initial decision on the subject in 1953, *In re S.*, 5 I. & N. Dec. 116, the Board of Immigration Appeals had interpreted Section 212(c) of the Act to require that an alien demonstrate a lawful domicile in this country maintained for seven years *subsequent* to his lawful admission for permanent residence (Pet. App. 7a-8a). Concluding that the BIA's interpretation was "neither inconsistent [with the statute] nor unjustified" (*id.* at 11a), the court deferred to the agency's interpretation "which, in its estimation, will better serve the legislative intent and purpose" (*ibid.*). The court thus followed the decision of the Ninth Circuit in *Castillo-Felix* v. *INS*, 601 F.2d 459 (1979), and rejected the decision of the Second Circuit in *Lok* v. *INS*, 548 F.2d 37 (1977), remarking that "[w]e agree with the Ninth Circuit for it is incredible to hold that Congress would let stand the unvarying and constant reading of its enactment by the INS for over 26 years if that reading disregarded the Congressional intent" (Pet. App. 10a).

ARGUMENT

Petitioner's primary contention (Pet. 7-17) is that the decision below conflicts with the decision in *Lok* v. *INS*, 548 F.2d 37 (2d Cir. 1977). We recognize the conflict between the reasoning of the Second Circuit in *Lok* and that of the Ninth Circuit in *Castillo-Felix* v. *INS*, 601 F.2d 459 (1979), which was adopted by the court below. However, it is doubtful that the question presented is sufficiently important or arises sufficiently frequently to warrant review by this Court. Moreover, the Board of Immigration Appeals' alternative determination that petitioner does not

merit discretionary relief under Section 212(c), even if he were eligible, provides a sound independent basis for the result below. This is accordingly an inappropriate case in which to consider the question presented by the petition. Finally, the INS' construction of Section 212(c) is a reasonable, consistent, and long-standing interpretation, adopted by the agency charged with the responsibility for enforcement of the statute. It therefore deserves the deference accorded it by the court of appeals.

1a. In *Lok* v. *INS*, *supra*, 548 F.2d at 39-41, the Second Circuit held that the BIA's interpretation of Section 212(c), limiting relief to individuals who could show seven years of lawful domicile after the date of admission as a permanent resident, was unsupported by the language or legislative history of that provision.[6] When this question next arose, in

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[6] Lok arrived as an alien seaman in 1959, but remained in the United States beyond the permitted interval and escaped detection until 1965. He was ordered deported in that year, but deportation was stayed for various reasons until Lok married an American citizen, who petitioned to classify him as her "immediate relative," eligible for immigration purposes. Lok voluntarily departed the United States in October 1971 and was admitted as a permanent resident in December 1971. One year later, Lok pleaded guilty to commission of a drug-related offense, which led to deportation proceedings under 8 U.S.C. 1251(a)(11). The immigration judge and the BIA denied relief under Section 212(c), on the ground that Lok lacked seven years of domicile following lawful admission for permanent residence. See 548 F.2d at 38-39. Rejecting the BIA's interpretation of Section 212(c), the court of appeals remanded to the Board for a determination whether Lok had maintained a lawful domicile for seven years—*i.e.*, whether his United States' domicile prior to admission as a permanent resident was lawful. 548 F.2d at 41. On remand Lok's domicile prior to his admission as a permanent resident

In re Anwo, 16 I. & N. Dec. 293 (1977), the BIA adhered to its narrower interpretation of Section 212(c), declining to follow the Second Circuit's *Lok* decision. In the alternative, the BIA held that Anwo could not qualify for relief, because he could not have lawfully harbored a domiciliary intent for three of the seven years of residence on which he relied.[7] The District of Columbia Circuit affirmed the BIA's decision, *Anwo* v. *INS*, 607 F.2d 435 (1979), without reaching the question addressed in *Lok*. The court endorsed the BIA's alternative holding, relying (*id.* at 437-438 & n.8) on this Court's statement in *Elkins* v. *Moreno*, 435 U.S. 647, 665-666 (1978), that holders of nonimmigrant student visas such as Anwo (see note 7, *supra*) were prohibited from having a domiciliary intent.

The Ninth Circuit next considered the question presented here, in *Castillo-Felix* v. *INS*, 601 F.2d 459 (1979).[8] Expressly rejecting the Second Circuit's

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was determined to be unlawful. *In re Lok*, I.D. No. 2878 (B.I.A. July 31, 1981), slip op. 12-15.

[7] Anwo was admitted as a nonimmigrant student in 1969. Such an alien must intend to remain a resident of his foreign country. 8 U.S.C. 1101(a)(15)(F)(i). Anwo was accorded permanent resident status in 1973 after he had married a resident alien in 1971. He was convicted of possession of illegal drugs in 1975.

[8] Castillo-Felix entered the United States illegally in 1963, but escaped detection until 1969 when he was apprehended and allowed to depart voluntarily in lieu of deportation. He returned to the United States, again illegally, one day after his departure. Castillo-Felix was again apprehended, in 1970, but succeeded in deferring his departure until he received a permanent resident visa and was admitted as an immigrant in 1972. Three years later he was convicted of introducing illegal aliens into the United States, and deportation proceed-

conclusion in *Lok* (*id.* at 463-464), the Ninth Circuit concluded that the statutory language and legislative history of Section 212(c) were ambiguous. 601 F.2d at 464-465. The court noted that even after *Elkins* v. *Moreno*, *supra*, most classes of nonimmigrants are barred from lawfully harboring domiciliary intent, and that, accordingly, relatively few cases would turn on the question. *Id.* at 464. The court thought it unlikely that Congress intended to include those few individuals who spent part of the required seven years in one of the small classes of nonimmigrants who are eligible to become domiciliaries, along with those who were permanent resident immigrants throughout, in the group eligible for relief under Section 212(c). *Id.* at 465. The court accordingly deferred to the BIA's long-standing interpretation of Section 212(c), finding it consistent with Congress' avowed purpose in enacting this provision: to narrow the class of aliens eligible for relief under a predeces-

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ings were commenced. The immigration judge held that Castillo-Felix was ineligible for relief under Section 212(c) because insufficient time had elapsed since his admission as an immigrant in 1972. The judge held, in the alternative, that he would deny relief to Castillo-Felix, in the exercise of his discretion, were he eligible. The BIA affirmed on the ineligibility ground, without passing on the alternative ground for the result.

The court of appeals agreed with the BIA on the question of statutory interpretation. The court noted, however, that, as in *Anwo*, "it is * * * unlikely that Castillo-Felix would be eligible for relief even if we adopted his interpretation of the statute." 601 F.2d at 463 n.7. The court thus apparently recognized that, as a result of the illegal character of his entry, Castillo-Felix (like the alien in *Lok*; see note 6, *supra*) could not establish a lawful domicile prior to his admission as a permanent resident.

sor enactment, the "Seventh Proviso" to Section 3 of the 1917 Immigration Act (Act of Feb. 5, 1917, ch. 29, Section 3, 39 Stat. 878).

b. The statutory construction in *Castillo-Felix*, adopted by the court below, is inconsistent with the analysis in *Lok*. Insofar as we are aware, however, the cases discussed above are the only ones in which the question presented for review by petitioner has arisen in the courts of appeals in the 29 years since the enactment of Section 212(c). As the Ninth Circuit noted in *Castillo-Felix* (601 F.2d at 465), the question presented does not affect any immigrants, *i.e.*, those admitted to this country for permanent residence, and can affect only a "small and rather exclusive group of nonimmigrants," *i.e.*, those who entered the United States lawfully without having to maintain a foreign residence. It accordingly appears that the issue lacks sufficient general importance to warrant review by this Court.

We think it significant, as well, that in the instant case, as in every other case discussing this question, a sound and independent alternative basis for the result is apparent. Here, the Board of Immigration Appeals has determined that petitioner is, in any event, undeserving of an exercise of discretion in his favor (Pet. Supp. App. 9a). While the court of appeals did not discuss this alternative ground for denying relief,[9] the discretion entrusted to the Attorney General and his delegates under Section 212(c) is broad and unqualified, and there is nothing in the record to show an abuse of that discretion here. See *INS* v. *Wang*, No. 80-485 (Mar. 2, 1981). To the contrary, the record shows petitioner's ac-

[9] This alternative ground was presented by the government in its brief filed in the court of appeals (Br. 22 n.13).

knowledged involvement in narcotics activity.[10] In these circumstances, it is most unlikely that petitioner could ultimately secure relief under Section 212(c), regardless of the resolution of the legal question concerning the correct interpretation of the statute. Hence, this case does not present an appropriate vehicle for further review. Cf. *INS* v. *Bagamasbad*, 429 U.S. 24, 26 (1976).

Each of the other cases interpreting Section 212 (c) cited by petitioner also contains an alternative ground for denying relief. In *Lok*, the alien was found upon remand to lack the necessary lawful domicile. See note 6, *supra*. In *Anwo*, the BIA and the court of appeals held that the alien was barred from lawfully harboring the necessary domiciliary intent during part of his residence (see page 7 & note 7, *supra*). In *Castillo-Felix*, the immigration judge indicated that he would deny relief in the exercise of his discretion, while the court of appeals recognized that the alien was probably unqualified for relief on other grounds (see note 8, *supra*). This pattern informs and substantiates our belief that the issue of statutory construction is of insufficient practical importance to warrant consideration by this Court.

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[10] In addition to the nature of petitioner's offense, which weighs heavily against discretionary relief in his case, we note that petitioner is apparently separated from his wife (Pet. App. 3a) and their daughter is being raised by her maternal grandparents in El Salvador (J.A. 66). Accordingly, the humanitarian policy of preserving family unity embodied in Section 212(c) has diminished force in the setting of this case. Compare *Lok* v. *INS*, *supra*, 548 F.2d at 41 & n.3.

2. In any event, the decision of the court of appeals is correct, for the reasons stated by the court below (Pet. App. 7a-11a) and by the Ninth Circuit in *Castillo-Felix* v. *INS*, *supra*, 601 F.2d at 462-467. If not compelled by the language of the statute or its legislative history (compare *id.* at 463-465 with *Lok* v. *INS*, *supra*, 548 F.2d at 40-41), the INS' interpretation is surely "neither inconsistent nor unjustified" (Pet. App. 11a) in light thereof.[11] In the absence of any conclusive indication of congressional intent, it is appropriate to defer to the agency's longstanding interpretation of Section 212(c). Such a "'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new,'" commands particular deference. *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408 (1961), quoting *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933). As the court of appeals observed (Pet. App. 10a), Congress' failure to disturb the BIA's practice by an amendment to

[11] The INS' interpretation of the statute "accords with well-established congressional goals" (*Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. 234, 251 (1978)), because the intent of Congress in enacting Section 212(c), as noted above (see pages 8-9, *supra*), was to limit the availability of discretionary relief from deportation. In framing the 1952 Act, Congress considered language that would have required the result reached by the INS (see S. Rep. No. 1515, 81st Cong., 2d Sess. 384 (1950)), but did not actually employ that language. As the Ninth Circuit noted in *Castillo-Felix* (601 F.2d at 465), the context of the cited Senate report makes it at least as likely that the language was omitted as superfluous as that its omission reflects a considered decision to reject the position advanced by the INS—which the Second Circuit had assumed in *Lok* (548 F.2d at 41).

the Act in the 28 years that have elapsed since the BIA announced its interpretation of Section 212(c) in *Matter of S., supra*, suggests that Congress approves of or has acquiesced in the administrative interpretation of the Act. *Zemel* v. *Rusk*, 381 U.S. 1, 11 (1965); *Haig* v. *Agee*, No. 80-83 (June 29, 1981) slip op. 18-19; *CBS, Inc.* v. *FCC*, No. 80-207 (July 1, 1981), slip op. 12-15.[12]

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[12] Petitioner's contention (Pet. 17-21) that the court of appeals "ignore[d] the important ramifications of [the] decision" of this Court in *Elkins* v. *Moreno*, 435 U.S. 647 (1978), is unjustified. The decision below expressly adopts the analysis employed by the Ninth Circuit in *Castillo-Felix* (Pet. App. 8a-10a). There, the Ninth Circuit took note of *Elkins* (see 601 F.2d at 464), recognizing that *Elkins* left open the possibility that certain limited classes of nonimmigrant aliens could establish a United States domicile. In *Elkins*, this Court held that nothing in the Immigration and Nationality Act precludes a non-immigrant alien belonging to a class not barred from harboring domiciliary intent from acquiring a Maryland domicile for the purpose of establishing eligibility for reduced tuition at the state university. 435 U.S. at 663-666. As the Ninth Circuit evidently recognized, nothing in *Elkins* casts light upon the distinct question presented here. This case instead concerns the relationship between the two jurisdictional predicates of Section 212(c): the requirement of lawful admission for permanent residence and the requirement of seven years' lawful unrelinquished domicile. Accordingly, the possibility that petitioner might, after *Elkins*, be able to establish a United States domicile—a showing that has yet to be required of him in this case—is not relevant to the resolution of the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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